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## Part VI

## Department of Transportation

Federal Highway Administration

Intelligent Vehicle-Highway Systems  
(IVHS): Procurement Recommendations;  
Agency Response; Notice

6 pages

Logbook  
Docket 94-2

## DEPARTMENT OF TRANSPORTATION

## Federal Highway Administration

[FHWA Docket No. 94-2]

Department of Transportation's  
Response to IVHS AMERICA's  
Procurement RecommendationsAGENCY: Federal Highway  
Administration (FHWA), DOT.

ACTION: Notice.

**SUMMARY:** The Department of Transportation (the Department) requested that IVHS AMERICA, as part of its function as a utilized Federal Advisory Committee, provide recommendations on procurement issues pertaining to the national Intelligent Vehicle Highway Systems (IVHS) program. IVHS AMERICA replied by submitting an October 1993 paper, "Procurement Issues in IVHS Development and Deployment." This notice sets forth the Department of Transportation's response to IVHS AMERICA's procurement recommendations.

**FOR FURTHER INFORMATION CONTACT:** Beverly Russell, Joint Intelligent Vehicle-Highway Systems Program Office, HVH-10, (202) 366-2202, Fax: (202) 366-8712, or Julie Dingle, Office of the Chief Counsel, HCC-32, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590, (202) 366-1394. To obtain a copy of IVHS AMERICA's paper, "Procurement Issues in IVHS Development and Deployment," contact IVHS AMERICA, 400 Virginia Avenue, SW., suite 800, Washington, DC 20024-2730, (202) 484-4847, Fax: (202) 484-3483.

**SUPPLEMENTARY INFORMATION:** The objective of the national IVHS program is to apply advanced technology in the areas of information processing, communications, traffic control, and electronics to improve safety, reduce congestion, increase mobility, reduce the energy and environmental harm caused by transportation, and increase economic productivity. The IVHS also incorporates the use of strategic planning and innovative management practices at all levels of government to implement those initiatives which enhance our national surface transportation system, strengthen our economy, and benefit a broad range of users.

The Department requested that IVHS AMERICA provide recommendations on procurement in response to both public and private sector concerns that existing Federal and State procurement laws could serve as a constraint to IVHS

deployment. The Department published a *Report to Congress on Nontechnical Constraints and Barriers to Implementation of Intelligent Vehicle Highway System* (June 1994) which discussed several of the procurement issues raised by IVHS AMERICA relating to IVHS development and deployment.

In addition, the Department drafted a formal response to IVHS AMERICA's recommendations. The text of the letter to Mr. James Costantino, Executive Director, IVHS AMERICA, from the FHWA dated June 3, 1994, presenting the Department's response is set forth below:

Dear Mr. Costantino:

In further response to my November 22 letter, I am forwarding a detailed response to IVHS AMERICA's recommendations on IVHS procurement issues. We also plan to publish the response in the *Federal Register*. Once again, I would like to thank IVHS AMERICA's Board of Directors, the Coordinating Council, and the Procurement Task Force for their efforts.

Sincerely yours,  
E. Dean Carlson,  
Executive Director.

Enclosure

**Department of Transportation's  
Response to IVHS AMERICA's  
Procurement Recommendations**

*Note: The problem statements and recommendations are taken directly from the October 1993 paper, "Procurement Issues in IVHS Development and Deployment," forwarded by IVHS AMERICA in its role as an advisory committee to the Department of Transportation. The Department's responses are in italics.*

**1. Problem Statement:** Contractors feel that the government insists upon receiving more intellectual property rights than are necessary for government purposes and does not pay the full value of such rights, reducing the contractor's ability to offset its development costs through sales to other government and private sector buyers.

**First Recommendation—Government** should only seek those intellectual property rights necessary for their portion of an IVHS system.

**Department's Response:** The Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 states that one of the goals of the national IVHS Program is to support the development and promotion of an IVHS industry. Balancing competing interests in intellectual property rights in a manner that will promote, rather than constrain, the development and availability of IVHS technologies

presents a challenge. The Department of Transportation (the Department) is addressing this challenge through its research and development and operational testing activities. Partnership agreements, which serve as the contractual mechanism for IVHS operational tests, clearly state the Department's objective on intellectual property. Consistent with the federal patent policy, non-federal participants in operational tests retain title to the subject inventions as an incentive to develop technological innovations. The Department retains the minimum license necessary to meet the Federal government's needs, leaving contractors and partners with the necessary rights to encourage private sector investment in the development of commercial products.

**Second Recommendation—**Government should create a uniform specific policy about what property rights will be sought, and also develop specific publicized methods for seeking waivers of the usual public-private allocation and be willing to negotiate these issues before a contract is awarded.

**Department's Response:** As noted above, the Department's current policy is to provide its partners and contractors with title to subject inventions developed as part of the IVHS program. The Department maintains only an irrevocable license. This is a minimum right which cannot be "negotiated away." However, the Department strongly supports U.S. IVHS product development and would not take action which would infringe on its commercial viability. The Department is therefore committed to not only outlining this policy in its contracts and partnership agreements, but to also, developing a set of principles and guidelines which will be published within calendar year 1994.

**Third Recommendation—**Government should utilize the experience from other IVHS procurements and other federal agencies to address this issue.

**Department's Response:** We agree that the Department can learn from other agencies which have developed innovative procurement mechanisms. The Department reviewed other Federal agencies' policies before developing the standard partnership agreement which is used for IVHS operational tests. The agreement has been slightly refined and modified based on experiences gained throughout the life of the Program. The Department has also begun using other procurement mechanisms to solicit IVHS projects (e.g., the broad agency announcement for the automated highway system) and will continue to

seek guidance on innovative means to facilitate procurement.

**2. Problem Statement:** The development and deployment of IVHS systems will frequently entail coordination of overlapping governmental requirements, either of different levels (federal, state, etc.) or of regional groups (e.g., EZ PASS), and nationwide deployment efforts will involve applications of similar systems in varying state and local jurisdictions. Coordination of these overlapping and sometimes conflicting requirements will require time and resources as well as present potential obstacles.

**Recommendation:**—The federal government should spearhead efforts to coordinate requirements, through demonstration/model rules for IVHS procurements, seeking revisions to ISTEA authority to allow interstate compacts so that regional requirements can be conformed, and through providing information to the IVHS community about the scope and existence of conflicting rules.

**Department's Response:** The Department recognizes the complexity and cost involved in complying with procurement regulations that will vary among jurisdictions and levels of government. Several efforts are planned or underway to respond to the concerns of the IVHS community.

Adherence to multiple requirements, of course, will take time, but the Department will seek to reduce unnecessary delays caused by conflicts which may arise late in the course of IVHS projects. The Department will encourage jurisdictions to involve their procurement representatives early in the process of project formation so that they are aware of project goals and can immediately set out to identify and resolve potential conflicts. By involving procurement specialists early in the project, jurisdictions may find that some procedures can be established that will be satisfactory to all parties, eliminating duplication of procedures.

Several efforts are underway at the Department to gather information on multiple, conflicting requirements that inhibit the progress of IVHS projects. The Department completed a study in September 1993, investigating multi-jurisdictional issues encountered by six metropolitan areas implementing varying scales of traffic management projects. The Department has also completed case studies of several IVHS operational tests involving multiple jurisdictions, including Advance, HELP, Transcom/Transmit, and Advantage I-75, and preparations are underway to monitor additional tests. Program-wide evaluations of operational tests will

yield more information on specific problems encountered in multi-jurisdictional IVHS procurements, and the Department will share evaluation results with the public and the IVHS community.

Regional operational authorities may be an appropriate, efficient mechanism for coordinating IVHS systems across jurisdictional boundaries and reducing multiple requirements. The merits of recommending legislative changes to permit the formation of interstate compacts for deployment of IVHS are under consideration by the Department. It should be recognized, however, that many communities, municipalities, and states believe it is in the best interest of their constituencies to retain operational and oversight authority over their traffic management systems. The Department will, in any event, pursue policies that will promote the successful coordination of IVHS across jurisdictional lines.

**3. Problem Statement:** Many of the private and public sector entities that will be involved in the procurement of IVHS systems are inexperienced in high technology procurements, leading to delays, mistakes, and less effective competition.

**Recommendation:**—Provide, support, expand, or publicize training sessions on high technology procurement issues for state and local procurement personnel and for businesses.

**Department's Response:** The Department strongly endorses developing and promoting training on high technology procurement. The Department is in the midst of its effort to provide support to State and local governments and the private sector on high technology procurement issues. The effort began in January 1993 with a conference on *Public/Private Partnerships: Managing the Legal Issues*. The conference included sessions on forming partnerships, defining project objectives, intellectual property, and cost accounting. In January 1994, the Department and IVHS AMERICA jointly sponsored a conference on intellectual property rights under public/private partnership agreements. As part of its Fiscal Year 1994 activities, the Department is developing two projects on procurement—an IVHS contracting course and a procurement research project. The objective of the former is to cover various aspects of contracting, including drafting specifications, allocation of intellectual property rights, ways to minimize or avoid protests and claims, and alternative funding mechanisms. The objectives of the latter is to provide recommendations for improving the efficiency of the

procurement process and developing alternative models for procurement of IVHS technology. The focus of the procurement research project will be on developing methods to work within existing organizational structures. The Department will continue to work closely with IVHS AMERICA and other interested organizations in developing and implementing procurement research, training, and informational efforts which address all governmental levels (Federal, state, and local) and the private sector.

**4. Problem Statement:** Cost accounting, auditing, and cost and price certification requirements create an expensive burden on potential IVHS contractors, increase the costs to the taxpayers of IVHS deployment, and reduce the pool of effective competitors.

**Recommendation:**—Minimize the procurements in which these requirements are applied to those where the goals of the rules are applicable.

**Department's Response:** In addressing cost accounting, cost certification, and auditing requirements, it is important to distinguish between direct Federal procurements and contracts under Federal grants and cooperative agreements. Most government IVHS procurement will be conducted by State and local [agencies] rather than Federal government agencies. For these procurements, the Federal requirements for cost accounting, cost certification and auditing of commercial contractors are limited. IVHS procurements funded by Federal grants and cooperative agreements to State transportation agencies (which is the typical scenario) are subject to the Uniform Administrative Requirements for Grants and Cooperative Agreements with State and Local Governments (OMB Circular A-102, known as the "common rule"), codified by the Department of Transportation at 49 CFR Part 16 and the requirements of Title 23, U.S. Code. The common rule reflects the doctrine of federalism, under which States are given the maximum administrative discretion possible with respect to the national programs they administer. When procuring property and services under a grant or cooperative agreement, a State follows the same policies and procedures it uses for procurements from its non-Federal funds. Although such procurements are State administered, the Department has a role in the IVHS program in providing technical assistance in the development of State and local procurement laws and procedures. As noted above, the Department is developing two projects on procurement. The Department is also studying procurement issues as they

arise in IVHS operational test projects and will develop projects to address those issues as appropriate.

Direct Departmental IVHS contracting efforts are focused primarily at research and development and program support and are governed by the Federal Acquisition Regulation (FAR). The FAR contains provisions for exemptions from or waiver of submission of certified cost or pricing data for negotiated contracts. FAR 15.804-3. A proposed rule was published on March 28, 1994, to "address unnecessarily requiring the submission of cost or pricing data" and to clarify when adequate price competition exists. 59 FR 14458. The proposed rule states that when there is a reasonable expectation that adequate price competition will result on a particular procurement, "the contracting officer should rarely have a need to require the submission or certification of cost or pricing data, regardless of the contract type."

Current regulations provide that the contracting officer shall not require submission or certification of cost or pricing data when prices are (1) based on adequate price competition, (2) based on established catalog or market prices of commercial items sold in substantial quantities to the general public, or (3) set by law or regulation. Price competition exists if (1) offers are solicited, (2) two or more responsible offerors that can satisfy the Government's requirements submit priced offers responsive to the solicitation's expressed requirements, and (3) these offers compete independently for a contract to be awarded to the responsible offeror submitting the lowest evaluated price.

At the recommendation of industry, the proposed rule clarifies the third condition for price competition by revising it to read: "Award will be made to a responsible offeror whose proposal is either (A) the lowest price; or (B) Offers the greatest value (see 15.605(c)) to the Government and price is a stated substantial factor in source selection." Thus, agencies have flexibility to waive cost and pricing data in a best value, negotiated procurement of the type generally used for Federal IVHS procurements. The Department will give closer consideration to the application of the cost and pricing requirements in its IVHS procurements.

**5. Problem Statement:** With respect to procurement issues, the potential for large products liability expenses may deter potential IVHS vendors from participating in government procurements and, thus, reduce competition and increase prices.

**Recommendation—**The government can seek statutory authority to indemnify contractors, can take actions necessary to enable contractors to invoke the government contract immunity doctrine, and can assist in ensuring that reasonably-priced insurance is available to reduce the uncertainties of potential product liability exposure.

**Department's Response:** The Department of Transportation, as well as the Department of Justice, does not believe there has been a demonstrated need for protectionist legislation to minimize potential products liability expenses on the part of IVHS designers, developers, or manufacturers. There has been no showing that liability concerns have indeed inhibited investment in or development of IVHS technologies. It is too early, accordingly, to consider the merits of legislation or other actions to protect developers or operators from liability risks. Additionally, no sufficient basis has been advanced for the Department to pursue legislation regarding Federal indemnification at this time. Such legislative proposals have budgetary implications and need very strong demonstrated justification in order to be considered by both the Departments of Transportation and Justice.

More specifically, with regard to the driver and traffic management information systems, for example, the liability exposure of participants in the automated traffic management systems (ATMS) and automated traffic information systems (ATIS) does not appear to be unique. It could be avoided, in any event, by the application of sound engineering principles. The advanced vehicle control systems (AVCS) carry the potential for enormous safety benefits. Their attendant risks of liability correlate to the degree of safe engineering practices; the National Highway Traffic Safety Administration and other organizations are engaged in extensive testing and analyses of these systems. The automated highway system (AHS), which poses the potentially greatest safety benefits, also carries risks of system malfunctions. This program, through, is still in its early stages of design and development. Extensive testing and assessment will be accomplished through the planned AHS consortium, and liability constraints will be carefully analyzed within that context. Additionally, the high level of industry interest in the AHS program suggests that the IVHS community is not being unduly chilled by liability concerns at this time. It is, accordingly, premature to conclude that liability

issues pose significant constraints to the deployment of this system.

It is the best government policy to encourage the safest, most effective transportation advancements by maintaining a stimulus for the IVHS developers to produce safe products and establish safe services. Limiting liability would lessen the incentive for those capable of controlling the design and manufacture of the products. Transferring liability to the Federal government by, for example, indemnification of IVHS manufacturers for a proportion of their liability costs or for judgments that exceed available insurance coverage, would result in similar safety disincentives. Such measures undermine the function of tort liability as a means of causing a manufacturer or designer to act with due care.

The Department is willing to work with IVHS AMERICA in exploring the availability of insurance for IVHS development projects. To date, to the Department's knowledge, participants in federally funded operational tests have not encountered problems with insurance coverage. Accordingly, legislation or other actions to ensure coverage appear to be premature. Nevertheless, the Department agrees that it is useful to include the insurance industry in relevant workshops and outreach programs.

For these reasons, the Department is not disposed to suggest that protective legislation is necessary to promote the implementation of IVHS technologies at this time. The Department will, however, consider the need for legislation, if any, during the course of our evaluations of legal issues during the operational tests and the AHS development program. The Department will also work with IVHS AMERICA and other interested participants to encourage the involvement of the insurance industry in public discussion concerning IVHS development.

**6. Problem Statement:** The cost of complying with varying governmental recordkeeping and administrative requirements will add to the cost of deploying IVHS systems at a time when government needs to be most efficient.

**Recommendation—**Evaluate every administrative requirement that differs from traditional commercial practices to determine whether it is worth the added cost to the taxpayers and society, and take aggressive action to reduce administrative cost of compliance with such requirements.

**Department's Response:** A number of general procurement reform activities are underway within the Government and the private sector, and the

Department will monitor those activities as they potentially impact IVHS procurements. Many of the specific reasons for the higher cost of doing business with the government identified in the IVHS AMERICA procurement paper do not apply to IVHS procurements because of the low dollar amount of these procurements or because of the nature of the acquisitions, i.e., research studies rather than products. It cannot be assumed, nor has it been demonstrated, that problems encountered in large DOD, NASA or other agency systems acquisitions apply to Departmental IVHS research and development activities. To the extent that specific problems can be identified with State or local IVHS procurements, the Department will sponsor research and work with the interested parties to recommend solutions.

**7. Problem Statement:** Larger IVHS vendors believe they will be unfairly excluded from providing the full range of IVHS design and implementation services due to organization conflict of interest (OCI) limitations at all levels of government.

**Recommendation—**Clarify the applicability of OCI rules and preempt application of unreasonable OCI rules by State and local governments.

**Department's Response:** Again, it is important to distinguish between direct Federal procurements and State and local procurements. The Federal Acquisition Regulation (FAR) organizational conflict of interest provisions do not apply to State and local procurements. Accordingly, a contractor would not be restricted from eligibility for State and local procurements as a result of the FAR conflict of interest rules. States and local governments use their own procurement procedures, including conflict of interest rules.

OCI rules in some form are necessary to provide governments with impartial advice and to preserve fair and open competition. The Department agrees, however, that the application of those rules to the IVHS program should be studied. The Department will consider State and local organizational conflict of interest rules as part of its research on innovative procurement methods. The Department will make appropriate recommendations and provide technical assistance in this area to State and local governments in developing necessary laws and regulations for acquisition of IVHS systems.

**8. Problem Statement:** Uncertainties resulting from public procurement policies, political involvement with procurements, and delays increase the

cost of IVHS development and deployment and discourage vendors from participating in this arena.

**Recommendation—**Engage in aggressive information exchange to reduce delays due to unrealistic scheduling and lack of advance planning, including seeking information from and distributing information to State and local entities and the private sector.

**Department's Response:** The IVHS AMERICA paper addresses a number of concerns on project uncertainties including procurement policies and potential Congressional involvement in the management of the IVHS program. The Department has some control over its own procurement policies to improve multi-jurisdictional, multi-partner contracts. However, the Department has little or no control over Congressional earmarking, except to explain the negative impacts on the Program. Congress has not interfered with the Department's implementation and management of IVHS projects. Therefore, this should not be a great concern for those interested in forming IVHS partnerships.

The primary problem with uncertainties in the government's contracting process is largely due to lack of communication, particularly in the early stages of a project. The Department recognizes this problem and is beginning to aggressively examine means to address this issue. As part of its Fiscal Year 1994 program, the Department will test and examine the benefits of a voluntary pre-agreement conference for early deployment and operational test participants. The objective of the project is to examine the benefits of a pre-negotiation process. The project's aim is to provide early and greater involvement by subgrantees and contractors in the development of the project and the negotiation of the partnership agreement. The results of this project will be used to develop mechanisms to facilitate multi-jurisdictional, multi-partner cooperation.

The Department will also include [a] representative of its contracting offices in the early stages of a project so that advance procurement planning can [be] facilitated.

As noted in the response under #2, the Department is also continuing its effort to track and examine institutional issues in U.S. operational tests. The objectives of the operational test case studies is to examine institutional and legal impediments encountered, and how they were addressed. The "lessons learned" emphasis of the studies will be

beneficial for future multi-jurisdictional, multi-partner efforts.

The Department will continue to work with its partners, including IVHS AMERICA, in its efforts to make IVHS procurement policies and contractual agreements consistent and comprehensible.

**9. Problem Statement:** The lack of broad agreement on the definition of public-private partnerships for IVHS and the methods by which they should be implemented create uncertainty over applicable procurement rules.

**Recommendation—**The Department should consult with the IVHS community and promulgate specific regulations or guidelines addressing the use of public-private partnerships in IVHS development and deployment in order to provide a definite framework for their implementation and to ensure that full and open competition requirements are not undermined inappropriately.

**Department's Response:** The Department disagrees that specific regulations or guidelines are needed to address the use of public-private partnerships in IVHS development and deployment. An IVHS "partnership" escapes a clear definition because it may mean something very different depending on the objectives of a particular endeavor or the area of emphasis—research, development, operational testing, deployment, or commercial product development. Consequently, the opportunities for innovation and flexibility associated with public-private partnerships should not be constrained within Federal guidelines or regulations.

The role of the Federal Government in IVHS public-private partnership is as a provider of information on the different means of structuring public-private partnership. A good start was the January 1994 conference, IVHS Public-Private Partnerships: Managing the Legal Issues. The Federal Government also serves as a trend setter by using its research and testing program to experiment with new contractual mechanisms. IVHS AMERICA also plays a critical role in broadening the use of public-private partnerships through its role as clearinghouse of ideas on new contractual mechanisms for all levels of government and the private sector. As the Federal IVHS institutional issues program is further developed, the Federal Government will look more aggressively towards providing outreach to State and local governments and the private sector on IVHS public-private partnerships. In turn, the Federal Government will continue its learning process by researching and, where

appropriate, applying innovative partnership arrangements developed by other Federal agencies, States, local governments, and the private sector.

Authority: 23 U.S.C. 315; 49 CFR 1.48; Pub. L. 102-240, Secs. 6051-6059, 105 Stat. 1914, 2189-2195.

Issued on: August 22, 1994.

**Rodney E. Slater,**

*Federal Highway Administrator.*

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